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# Different Requirements for Different Opting Out Clauses under Swiss Public Takeover Rules:

In its decision 843/01 dated 3 May 2023 (published 11 August 2023), the Swiss Takeover Board (TOB) confirms its practice on the validity of opting out clauses – different requirements may apply to different opting out clauses depending on when the opting out clause was introduced by the target company. For purposes of evaluating the validity of opting out clauses, a proper review of the relevant *factual* circumstances is critical.

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# Different requirements for different opting out clauses

In its decision 843/01, the Swiss Takeover Board (TOB) confirmed its practice on the validity of opting out clauses, applying different requirements depending on when the clause was introduced by the company. This newsletter summarizes the decision and the requirements in general.

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## Background

With the publication of its pre-announcement on 11 August 2023, Germany-based ELANTAS GmbH (**ELANTAS**) announced to make a public cash tender offer for all publicly held shares in Von Roll Holding AG (**Von Roll**), a company listed on the SIX Swiss Exchange (**SIX**).[1] On the same date, ELANTAS and Von Roll had entered into a transaction agreement. The board of directors of Von Roll had recommended the offer for acceptance. ELANTAS is indirectly held by the Germany-based Altana AG (**Altana**).

80.89% of the Von Roll shares are held by members of the von Finck family (**Family**), whereby 73.2% of the Von Roll shares are directly or indirectly held by three members of said Family (**Shareholder Group**). With the publication of the pre-announcement, ELANTAS therefore also entered into a share purchase agreement (**SPA**) with the Family. Those shares are outside the scope of the PTO.[2]

The articles of association of Von Roll contain an opting out clause stating that an acquiror of shares in the company is not subject to the duty to make an offer (as per the Swiss Financial Market Infrastructure Act (**FMIA**)). The opting out clause was introduced at the shareholders' meeting of Von Roll on 20 April 2012, i.e., when the company was already listed on the SIX.

Against this background, Altana requested the Swiss Takeover Board (**TOB**) to confirm that the opting out clause is valid in case of a PTO by Altana. In its decision of 3 May 2023, published on 11 August 2023, the TOB, after reiterating key aspects of its practice, confirmed that the opting out clause was valid.

## Opting out and its consequences

Pursuant to the art. 135 of the FMIA, anyone who acquires equity securities which, added to the equity securities already owned by such person, exceed the threshold of 33⅓% of the voting rights of a listed company, must make an offer to acquire all listed equity securities of such company (mandatory PTO). The articles of association of a listed company may increase the threshold for a mandatory PTO to up to 49% (so-called opting up) or completely waive the obligation of a bidder to make a mandatory PTO (so-called opting out). The consequence of an opting out is not only that an acquiror is not obliged to make a mandatory PTO but also the non-applicability of the whole set of provisions governing mandatory PTOs (including more restrictive provisions on offer conditions as well as the minimum price rule).

## Validity conditions – the first distinction

For companies incorporated under the laws of Switzerland, the shareholders' meeting is competent to amend the company's articles of association. The shareholders' meeting is thus also competent to resolve on the introduction of an opting out. In the absence of an arbitration clause, Swiss civil courts are competent

to decide on the validity of a shareholders' resolution seeking to amend the articles of association. The courts decide on the basis of generally applicable Swiss company law. For listed companies, art. 125 et seqq. FMIA (chapter of public takeover offers) are additionally applicable, and the TOB is competent to issue decisions necessary for the enforcement of such provisions. The latter includes the decision as to whether an opting out is valid or not (from a FMIA point of view) in relation to a particular PTO. When deciding, the TOB differentiates as follows:

**Introduction prior to listing**

In cases where the shareholders' resolution introducing the opting out was adopted ***before*** the company's shares (or other equity securities) were listed and such resolution is not obviously void, the TOB will not second-guess the validity of the opting out clause. If a shareholder wants to challenge the validity of the opting out, such shareholder must challenge the validity of the shareholders' resolution before civil court (within two months of the relevant shareholders' meeting).

**Introduction during transition period between 1 January 1998 and 31 December 2000**

Companies that were already listed when the law on PTOs came into force were allowed to introduce an opting out provision during a two-year transitional period until 31 December 2000. Subject to grounds for nullity, the TOB will not examine the validity of such clauses either.

**Introduction after listing – requirements of double majority and transparency**

In all other cases of companies introducing an opting out, as in the present case of Von Roll, the requirements of double majority and transparency apply.

The **requirement of double majority** *firstly* requires that the majority of the votes represented at the relevant shareholders' meeting or a higher quorum foreseen in the articles of association approves the introduction of the opting out. *Secondly*, the majority of the represented votes of the minority shareholders[3] must approve the introduction as well (majority of minority approval).

According to the **requirement of transparency**, the shareholders must be informed about the introduction of the opting out and its consequences in a transparent manner. The intentions of the person/entity interested in introducing the opting out and of the majority shareholder (if any/different) as well as the reasons for the introduction must be disclosed. This includes comprehensive information on any planned transaction and any change of control resulting therefrom. Furthermore, the effects and consequences of the opting out must be set out both generally and in relation to the target company concerned.

If the requirement of double majority and the transparency requirement are met, the presumption applies that the opting out clause does not prejudice the interests of shareholders and that consequently the opting out clause is valid under Swiss takeover law – this presumption may only be rebutted if there are **special and exceptional circumstances**.

**Transparency requirements – the second distinction**

As described above, for the validity requirements of an opting out, a distinction must be made as to whether the company was listed or not when the opting out was introduced. However, as regards the transparency requirement, a second distinction needs to be made.

**Introduction after 11 October 2012**

The information to be disclosed under the transparency requirement must be provided twice: firstly, as part of the invitation to the shareholders' meeting, and secondly, in the shareholders' meeting itself. In its decision 843/01, the TOB explained that this practice has essentially been applied since 11 October 2012. The TOB also reminded that in its decision 531/01 of 26 April 2013, it had decided to apply its practice retroactively to opting out clauses introduced before 11 October 2012, provided that the relevant transaction took place thereafter.

**Introduction before 11 October 2012**

However, the TOB further explained that in its decision 531/01 of 26 April 2013, it had also decided that in case of opting out clauses introduced before 11 October 2012, the transparency requirement will be applied in a less strict sense. This means, in particular, that the transparency requirement can be met by providing the necessary information at the shareholders' meeting itself; an inclusion of the information in the *invitation* to the shareholders' meeting is not necessary for the purpose of Swiss takeover law.

The TOB stated that in the case at hand the invitation to the shareholders' meeting of 23 March 2012, did not fully explain the consequences of the opting out clause. Rather, the invitation gave the impression that the clause only covered internal "restructurings" within the shareholder group von Finck, implying that other transactions would trigger the duty to make an offer. According to the TOB, however, it was sufficient that it was mentioned at the shareholders' meeting that the opting out would also exempt any other acquirer of Von Roll shares from the duty to make an offer and from complying with the related rules of Swiss takeover law. Since there had been no specific planned transaction about which should have been informed, the TOB concluded that the transparency requirement was met. The TOB then examined and concluded that the requirement of

double majority was also met. As a matter of consequence, the presumption applied that the opting out clause did not prejudice the shareholders' interests and that it was hence valid under Swiss takeover law. Since there were no special and exceptional circumstances apparent to the TOB, the TOB held that the opting out clause was valid in case of a PTO by Altana and that the minimum price rule would not apply.

### Conclusion

Although the TOB confirmed its practice regarding the validity of opting out clauses, for purposes of evaluating the validity of opting out clauses, it is crucial to properly review the relevant *factual* circumstances and to obtain a decision from the TOB as to whether an opting out is valid in view of a specific transaction. At the same time, when considering implementing an opting out clause, the current practice of the TOB must be taken into account.

## Endnotes

1 Cf. on public takeover offers under Swiss law, p. 91 et seqq.
2 Public Takeover Offer.
3 A minority shareholder is a person who neither (a) holds, directly or indirectly or in concert with third parties, shares of more than 33⅓% of the voting rights of the target company nor (b) has requested that the company introduce the opting out.

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